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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 92

UNITED STATES OF AMERICA, PETITIONER

v.

CITY OF NEW BRITAIN, CONNECTICUT, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

REPLY BRIEF FOR THE UNITED STATES

At the close of the argument of this case on December 1, 1953, the Court gave respondent leave to file a supplemental brief. Because there will be no opportunity to deal orally with the arguments advanced in the supplemental brief, this brief in reply is respectfully submitted.

I

THE FORTUITOUS PRESENCE IN THIS CASE OF MORTGAGE AND JUDGMENT CLAIMS CANNOT DIMINISH THE SUPERIORITY UNDER CONTROLLING FEDERAL LAW OF THE FEDERAL LIEN OVER THE MUNICIPAL LIEN

A. *The circuity problem respondent poses cannot justify the decision below*

Respondent argues (Supp. Br. T2, T4–6) that "Even if *arguendo* it should be conceded that the

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federal liens would supersede the City's liens in a contest not involving encumbrances prior to the federal liens, the presence of such encumbrances here creates a logically insoluble circuity of priority" unless the City's liens are paid ahead of the federal liens. We believe, on the other hand, that the parties correctly framed the issue when they stipulated (R. 12) that the "present controversy is between the city of New Britain and the United States of America as to which is entitled to priority in the distribution of the proceeds." It seems clear to us that the resolution of this controversy will determine the relative priorities in similar controversies whether or not mortgagees or judgment creditors are present. The dispositive point in any case is that the federal lien *vis-à-vis* the City lien is paramount under the federal law which, it is agreed, is controlling.

The "circuity" and the "illogicality" respondent discerns in our position stems from a failure to remember at critical junctures that two bodies of law, federal and state, are involved here, and that the federal law is superior—a critical point which is necessarily conceded, but sometimes overlooked, by respondent. Thus, respondent's statement of our position requires the italicized additions we insert in brackets in order to formulate adequately the terms of the legal problem. As thus amended, the summary of our stand at page T5 of respondent's supplemental brief reads:

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> The government does not challenge the priority [*under Connecticut law*] of *A* [the City's liens] over *B* [mortgages and judgment lien], and concedes the priority [*under federal law*] of *B* over *C* [federal liens] * * *. It contends nevertheless that *C* is paramount [*under federal law*] to *A* * * *.

Omitting the crucial matter we have inserted in italics, respondent concludes (*ibid.*) that "Insofar as logic affords a guide to solution of the problem presented, the result reached below would seem to be irrefutable."

But this is faulty logic indeed. If *A* is prior to *B under state law* and *B* is prior to *C under federal law,* these premises afford no logical ground for concluding that *A* is prior to *C under federal law.* Our point is, simply, that the undisputed premises provide no clue, in point of logic, to the relationship between *A* and *C* under federal law. For that relationship, one must look, not to a supposed logic which reaches a supposedly "irrefutable" solution through the elementary fallacy of shifting the terms of its premises, but to the command of the federal statute. And that command, to which we turn, leaves no ground for the municipal supremacy respondent asserts.[1]

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[1] Respondent objects to a "circuity of priority" in which it finds "a logically insoluble problem" (Supp. Br. T5–6, N1–2). It goes on to illustrate the logical and aesthetic objections to circuity by reference to scholarly discussions which exist precisely because, under a single body of state

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B. *The language, the legislative history, and this Court's construction of 26 U. S. C. 3672 preclude reading into this provision a grant of priority to municipal liens*

It bears emphasis that on respondent's major theory (the theory that, because they prime other encumbrances under Connecticut law, the municipal liens should be regarded as included in 26 U. S. C. 3672, though the precise and specific terms of this provision admittedly omit such liens) the federal liens would be subordinated to municipal liens which arose later. On its face, then, the theory confronts the clear and settled principle "that a tax lien imposed by a law of Congress * * * cannot, without the consent of Congress, be displaced by later liens imposed by authority of any state law or judicial decision."

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law, such circuity arises. Several brief observations seem pertinent to this problem: (1) If circuities exist even under the law of a single state, it is not surprising that they may arise in cases requiring application of both state and federal law. (2) Granting respondent's conclusion that "there can be no ineluctable correct result" (Supp. Br. T6) for a circuity problem under state law alone, it does not follow that the problem here should or may be exorcised by giving the municipal liens a superiority over federal liens for which there is no justification in the statutes Congress wrote. (3) If avoidance of circuity is the state's overriding goal, it may be achieved by paying mortgages and judgments first, federal liens second, and municipal liens third, on the ground that the latter, like the host of other liens not mentioned in 26 U. S. C. 3672, cannot supersede the federal liens and should not, therefore, supersede liens which are granted priority by Section 3672. (4) Finally, the state court may adopt the solution mentioned in *Spokane County* v. *United States*, 279 U. S. 80, 91, and discussed at p. 17 of our main brief.

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Michigan v. *United States,* 317 U. S. 338, 340. Respondent urges, however (Supp. Br. T6–9), that "Congress must be taken to have intended" that 26 U. S. C. 3672 should be read as if it mentioned municipal liens like those involved here. We submit, to the contrary, that there are decisive reasons in this case against holding that Congress must be taken to have said what it left unsaid.

1. As we have shown in our main brief (pp. 13–15), the history of the federal lien provisions, in the context of this Court's decisions, argues powerfully against making additions to the plain and limited terms of 26 U. S. C. 3672 based on state lien law. We do not question respondent's point (Supp. Br. T7) that the kind of municipal tax involved here "is generally secured in this country by a lien" which is superior, under state law, to other encumbrances.[2] But this fact cannot justify treatment of such liens as if they were included in, though they are omitted from, 26 U. S. C. 3672.

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[2] It should be observed that the respondent City's claims include liens for water rents as well as real property taxes. Respondent, urging the special status of the latter, makes arguments which would appear to be inapplicable to the water rent liens. Accordingly, while we think the claims fail as to both sets of liens, we note that success for the respondent based on the general character of real estate tax liens should not necessarily govern the problem of the water liens.

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If, as respondent conjectures, Congressmen automatically thought of the preferred place under state laws of real estate liens—and if Congress had reason to add such liens to the four protected interests included in Section 3672—the simplest and most obvious course would have been to say so. The fact is, however, that on respondent's own analysis of Section 3672 as a "notice-filing provision" (Supp. Br. T11), there was no reason for granting to state tax liens a protection comparable to that which Congress deemed fair as to mortgagees and purchasers. See pp. 7–10, *infra*. So there is here much more than the ordinary question whether law should be fashioned from Congressional silence. There is here the fatal objection that the law respondent would fashion is in no sense a mere extension or elaboration of the purposes Congress actually expressed.

When Congress first created the federal lien, with no exceptions, it was no less pertinent to argue, as respondent does now (Supp. Br. T7), that the members of Congress knew what men of affairs ordinarily know. Congress must have known, then, of the protection universally accorded an innocent purchaser against secret liens. Yet, *United States* v. *Snyder*, 149 U. S. 210, denied such protection against the secret federal lien, refusing to read the federal statute as if it tacitly adopted state law limitations, however universal and beneficent.

Congress remedied this situation, narrowly and specifically, in what is now 26 U. S. C. 3672, pro-

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tecting, in addition to purchasers, judgment creditors and two other classes. Early this year, this Court considered whether municipal liens substantially similar to the ones in this case (see our main brief, pp. 27–28) could be included as "judgments" in Section 3672. And the Court held that, however much "in the nature of a judgment" the action of the state taxing authorities might be under state law, only a judgment creditor "in the usual, conventional sense" could qualify for inclusion in Section 3672. *United States* v. *Gilbert Associates,* 345 U. S. 361, 364–365.

So, although respondent is under state law very like a "judgment creditor"—a class specifically named in Section 3672—it cannot prevail under Section 3672 through this characterization. We think a fair reading of the pertinent materials—statutory language, history, and decisions—leaves even less ground for importing respondent's liens into Section 3672 as a new, wholly unmentioned class which Congress "must be" guessed to have considered.

2. In 26 U. S. C. 3672, Congress undertook to protect against the federal lien four classes of interests which are acquired in reliance upon lack of notice of prior claims. The respondent City, which neither relies upon the absence of prior claims in acquiring its lien nor defers to subsequent claimants who have no notice of its lien, cannot claim to fall within the classes with which Congress was concerned in enacting Section 3672.

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As respondent points out (Supp. Br. T11), and as the House Report respondent cites makes clear beyond doubt (H. Rep. No. 1018, 62d Cong., 2d Sess., *passim.*), the provision which is now 26 U. S. C. 3672 was designed to require *notice* of the federal lien as a condition to its validity against the specified classes of interests for which Congress deemed such notice fair and desirable. Thus, describing the situation under the federal lien statute prior to the added notice provision, the House Report (No. 1018, *supra*) on this provision said (p. 1):

> A person proposing to buy the property of another could protect himself against such a lien only by ascertaining from all the collectors in the United States whether or not the vendor was delinquent in the payment of taxes. This would be a great hardship and would make it practically impossible for any person proposing to buy property to secure himself against such liens. The same hardship would devolve upon mortgagees and judgment creditors.[3]

[3] The Report went on (p. 2) to describe the amendment as providing "a very simple means of giving this notice that would not at all be burdensome upon the Government." It described the existing federal lien as a "secret lien" and expressed the subsequently vindicated belief that the states would "readily pass legislation authorizing the filing of notice in the office of the registrar or recorder of deeds, in order to protect [their] citizens in business transactions against liens which the citizens can not know of except at great cost of money and time." *Ibid.*

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When the plain and single role of Section 3672 as a notice-filing provision is considered, no basis is left for the argument by conjecture that "Congress must be taken to have intended" (silently) that municipal liens like respondent's would be read into the Section. The interpolation could not be justified in terms of the purpose of Section 3672. These municipal liens arise, automatically and even before municipal taxes are due, without regard to whether prior interests exist. There is no reliance by the City even remotely comparable to the reliance of a mortgagee or purchaser which renders notice necessary and desirable.

The incongruity of respondent's position is, here again, a result of intermingling state and federal law without regard to the separate purposes and status of each. The City claims priority over mortgagees, under state law, without regard to notice or to the time when the mortgages arise. The federal statute protects the mortgagee before notice. After notice, the mortgagee is subordinate to the federal lien. But the City claims superiority over the federal lien in this case because the mortgagee and judgment creditor acquired their interests before notice of the federal lien—though such notice is irrelevant as between municipal and federal liens on the one hand, and as between municipal liens and mortgagee and judgment creditor on the other.

What of the municipal lien in a case where there is a mortgage subordinate to the federal

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lien because the mortgagee had notice of the latter? And where does the municipal lien stand in a case where there is no mortgage or other interest named in Section 3672? Neither the statute nor respondent's argument supplies a basis for concluding that in such cases the municipal lien would be superior to the federal liens. The reason, we submit, is that the municipal lien, on its own hook, has no place in the notice-filing scheme of Section 3672.

3. Of interest under this point, finally, is the fact that the rule respondent would fashion for Connecticut does not apply in the District of Columbia. The District lien for real property taxes, at least where it arises after the federal tax lien, is subordinate to the latter. *Cobb* v. *United States*, 172 F. 2d 277 (C. A. D. C.).

Thus, despite respondent's supposition that Congress must be deemed tacitly to have conferred an overriding supremacy on municipal tax liens, the only concrete evidence is strikingly to the contrary. For when Congress itself created a lien like respondent's, it attributed to it no such preferred status as respondent claims.[4]

[4] The distinction respondent proposes between Connecticut and the District of Columbia points to a general infirmity in respondent's position: That position would leave the operation of the federal lien to turn upon the attributes of municipal liens under varying state laws. While statutes like Connecticut's are common, a number of states provide that municipal real property tax liens like the respondent's shall be effective against all private persons, but not against the

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II

THE MUNICIPAL LIENS WHICH AROSE BEFORE THE FEDERAL LIENS ARE NOT ENTITLED TO PRIOR PAYMENT

In its original brief (at p. 5), apparently conceding the controlling force of *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47, respondent flatly denied that "Congress intended what the United States Supreme Court assumes." In oral argument, counsel for respondent announced that *Security Trust* had been "distinguished to death," and respondent's supplemental brief (p. T10) undertakes to distinguish it from this case. To prevail, we think, respondent must persuade the Court to overrule the unanimous decision in *Security Trust*. For the distinctions it proposes are without substance.

1. The first attempted distinction is in the fact that *Security Trust* "did not involve three or

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state or county. See, *e. g.*, Iowa Code Anno., § 445.28; Miss. Code. Anno., vol. 7A, § 9744; *City of Opp* v. *Brogden*, 236 Ala. 180. In such states, under respondent's view, two results are possible: (1) The municipal lien could be held superior to the federal lien, though inferior to the state or county lien, surely an anomalous ranking of governments. (2) The municipal lien could be held inferior to the federal as well as state and county liens. While the latter result seems sensible, it also means that the rank of the federal lien is determined in each case by state, not federal, law. This would pervert the principle that the status of the federal lien "is always a federal question" (*United States* v. *Security Trust & Savings Bank*, 340 U. S. 47, 49) and abandon the "cardinal principle" of uniformity in federal taxation. *United States* v. *Gilbert Associates*, 345 U. S. 361, 364.

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more liens some of which were concededly prior to the federal tax lien * * *." It is clear, however, in California as elsewhere, that the attachment lien there involved would have been superior to a subsequent mortgage. *Bank of America National Trust and Savings Assn.* v. *Hill,* 9 Cal. 2d 495; *Duhart* v. *O'Rourke,* 99 Cal. App. 2d 277. It is equally clear that such a mortgage, if executed before filing of the federal lien, would have been superior to the federal lien. Nevertheless, the attachment lien, though it antedated the federal lien, was held by this Court to be subordinate.

There is not a word in the opinion, and there is no basis in reason, to support the view that the result in *Security Trust* would be different if a mortgagee happened to be in the picture. The suggestion is, however, that the position of a California attachment lien as against the federal lien will be determined by precisely this adventitious circumstance. We submit that the suggestion is fallacious.

2. Respondent argues further that the attachment lien in *Security Trust* lacked the preferred status under state law of the municipal liens involved here. Stated separately, but essentially connected, is the third attempted distinction that "the attachment lien had not reached the stage of immediate inforcibility that characterizes the City's tax liens in this case." But neither of

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these assertions affords any basis, either under the *Security Trust* decision or the terms of the federal statutes, for applying here the "first in time" doctrine which was held inapplicable in *Security Trust*.

As we have shown in our main brief (pp. 21–28), the *Security Trust* decision not only denies the applicability to the federal lien of the "first in time, first in right" doctrine; it also states the only possible condition under which another lien *might*, by being earlier in time, take precedence over the federal lien. That condition is that the earlier competing lien must, at least, be "specific" and "perfected" in the same sense required to defeat the Federal Government's priority under R. S. 3466. 340 U. S. at 51.[5]

We have also shown in our main brief that (pp. 25–28) respondent's liens do not meet this test. Respondent counters (Supp. Br. T12) with the assertion that its liens were "perfected" "in every sense in which the term is used outside the esoteric world that has enveloped Section 3466 of the Revised Statutes since 1929." But the precise point is, again, that what respondent cavalierly characterizes as the "esoteric world"

[5] As we noted in our main brief (p. 25, n. 11), the Court has left open the question whether even a specific and perfected lien will prevail against the priority of the United States under R. S. 3466.

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of R. S. 3466 envelops this case under the plain mandate of *Security Trust.*[6]

And this conclusion, which we supported at length and which the Court adopted in *Security Trust,* makes obvious sense. It seems clear that as to tax debts, for which Congress specifically created a lien, the Federal Government should enjoy no less secure a position against other claimants than it does merely as a general creditor in insolvency. Respondent suggests no sound reason for this Court's departure from the view that "If the purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents is to be fulfilled, a * * * rule [similar to that under R. S. 3466] must prevail here." *Security Trust,* at 51.

In short, the doctrine of "first in time, first in right" is no more effective here than it was in *Security Trust.* Respondent undertakes to avoid this conclusion by reference (Supp. Br. T14) to

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[6] In *Michigan* v. *United States*, 317 U. S. 338, ruling that the federal estate tax lien prevailed over a subsequent state tax lien, the Court noted that there was no need in that case to "consider the extent to which Congress may give, or intended by § 315 (a) to give, priority to a federal lien over a *previously perfected* state lien. Compare *New York* v. *Maclay*, [288 U. S. 290,] 292; *Spokane County* v. *United States*, [279 U. S. 80,] 95; *United States* v. *Texas*, [314 U. S. 480,] 484–6." 317 U. S. at 341 (emphasis added).

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the statement in the House Report on what is now 26 U. S. C. 3672 that "There is no reason why the Government should not occupy the same position with reference to liens on property as does the individual." H. Rep. No. 1018, 62d Cong., 2d Sess., p. 2. If this statement had no context, it would mean, of course, that this Court erred grievously less than a year ago in *United States* v. *Gilbert Associates,* 345 U. S. 361, and little more than three years ago in *United States* v. *Security Trust & Savings Bank,* 340 U. S. 47. But the statement has a clear context, and that context repels the inference respondent proposes. As we have shown (*supra,* p. 8), and as respondent agrees (Supp. Br. T11), the Report was concerned strictly with the problem of notice. It was with reference to this problem—and only as it affected the classes of interests specified—that Congress determined to place the Federal Government in the position of the private, individual lienor. Had it intended to equate the Government with such individuals in all, or any, other respects, Congress could quite simply have said so. But the precise, sparing language Congress chose gives no hint of support to the view that the rule of "first in time, first in right" was being adopted.

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CONCLUSION

It is respectfully submitted that the judgment below should be reversed.

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